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Supreme Court of the United States

WILLIAM D. MCCARTY, DAVID W. HADLEY, JUDITH G. RIPLEY, CAMIE J. SWANSON-HULL and DAVID W. ZIEGNER, in their official capacities as Commissioners of the Indiana Utility Regulatory Commission,

Petitioners,

v.

MIDWESTERN GAS TRANSMISSION COMPANY and SOUTHERN INDIANA GAS AND ELECTRIC COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF RESPONDENT SOUTHERN INDIANA GAS AND ELECTRIC COMPANY IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. The Seventh Circuit's Broad Preemption Exception Would Swallow *Younger* Abstention And Defeat Its Purposes 2

II. If The Court Recognizes A Preemption Exception To *Younger*, It Should Follow *NOPSI*'s Requirement Of "Facially Conclusive" "Flagrant And Patent" Preemption 4

A. Three Inconsistently Reasoned Circuit Court Opinions Do Not Support A Facially Conclusive Finding 4

B. This Court's Opinions Do Not Support A Facially Conclusive Finding 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases **Page**

Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n, 461 U.S. 375 (1983) 5

Cascade Natural Gas Corp. v. FERC, 955 F.2d 1412 (10th Cir. 1992) 5

FPC v. East Ohio Gas Co., 338 U.S. 464 (1950) 5

FPC v. Transcontinental Gas Pipe Line Corp., 365 U.S. 1 (1961) 7

General Motors Corp. v. Tracy, 519 U.S. 278 (1997) 6

Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 2

Michigan Consolidated Gas Co. v. Panhandle Eastern Pipe Line Co., 887 F.2d 1295 (6th Cir. 1989) 5

New Orleans Pub. Serv., Inc. v. Council of New Orleans, 491 U.S. 350 (1989) 1, 3, 4

New York v. FERC, ___ U.S. ___, 122 S.Ct. 1012 (2002) 6, 7, 8

Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n, 341 U.S. 329 (1951) 6

Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana, 332 U.S. 507 (1947) 6

Pub. Util. Comm'n of California v. FERC, 900 F.2d 269 (D.C. Cir. 1990) 5, 7

Younger v. Harris, 401 U.S. 37 (1971) 1, 3, 4, 6

Statutes

Ind. Code § 8-1-2-87.5 5

Other Authorities

Peter Fox-Penner, *Electric Utility Restructuring, A Guide To The Competitive Era* (1997) 8

REPLY BRIEF OF SOUTHERN INDIANA GAS AND ELECTRIC COMPANY IN SUPPORT OF PETITIONERS

This case presents important questions of comity and federalism, and the Court's recognition in *Younger v. Harris*, 401 U.S. 37 (1971), that states must be free to interpret and enforce their laws without interference from the federal judiciary. Respondent Midwestern Gas Transmission Company ("Midwestern") and the *amici curiae*[1] downplay these cert-worthy issues and devote the majority of four briefs to arguing the merits of their underlying preemption claim or defense. But for *Younger* purposes, the question is not whether valid or even compelling arguments support a claim of preemption. The question is whether preemption is, on its face, so conclusively "flagrant and patent" that the State should not be allowed even to address the claim initially.

The Court said in *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350 (1989) ("*NOPSI*"), that "perhaps" a narrow exception to *Younger* exists for a "facially conclusive" finding that the state law being enforced is "flagrantly and patently" preempted. *Id.* Neither *Younger* nor *NOPSI* legitimized an exception for state laws that "seem" to be "patently *or* facially invalid." The exception, if it exists at all, requires that preemption be *both* "facially conclusive" *and* "flagrant and patent." Under the lesser standards adopted by the Seventh Circuit and by other circuits, the *Younger* issue is lost in federal judicial analysis of the constitutional question that the state tribunal must be trusted to decide. The resulting conflict with *Younger* and *NOPSI* requires the Court's immediate review.

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[1] Grain Processing Corporation ("GPC"), Interstate Natural Gas Association of America ("INGAA"), Scepter, Inc. ("Scepter") and Indiana Industrial Energy Consumers, Inc. ("INDIEC").

I. The Seventh Circuit's Broad Preemption Exception Would Swallow *Younger* Abstention And Defeat Its Purposes.

As the opposition briefs repeatedly argue, the Natural Gas Act ("NGA") gave the Federal Energy Regulatory Commission ("FERC") jurisdiction over two areas: the transportation of gas in interstate commerce and sales for resale. But FERC's authority under the NGA is specifically limited to those areas. Congress did not invade the states' well-established jurisdiction over both: (1) retail sales and (2) local distribution services and facilities. The heart of the underlying dispute is whether a pipeline company's direct delivery of gas to end-users is "local distribution" of natural gas through "facilities for such distribution." The answer to this question is not to be found in the text of the statute "on its face." It requires consideration of competing statutory interpretation canons and analysis of over 75 years of case law, all under the *presumption* that a state's exercise of its historical police power is valid. See *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

The Seventh Circuit resolved the statutory interpretation dispute *not* by addressing whether the alleged preemption was flagrant or patent, but through the ambiguous pronouncement that "it seems to us" the service at issue was "interstate transportation," to be regulated by FERC, and not "intrastate transportation." Pet. App. 4a.[2]

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[2] Midwestern cannot dispute that the Seventh Circuit's opinion is devoid of analysis of the relevant statute beyond a dismissive "seems to us" statement. Thus, Midwestern tries to attach some significance to the court's parallel assertion that it has "seemed" to three other circuit courts that state regulation of the bypass is preempted. In Midwestern's view, the Seventh Circuit's statement that the local delivery activity at issue "seemed" (in other words, "appeared to be") within FERC's jurisdiction in the opinion of three other circuits transforms the Seventh Circuit's half-hearted discussion of the statute into a "facially conclusive" finding of "flagrant and patent" preemption.

The Seventh Circuit did not even mention the key statutory reservation of state regulatory power over "local distribution," and offered *no* explanation why Midwestern's direct local delivery service to end-users is *not* "local distribution."

The court of appeals' "seems to us" finding does not approach the "facially conclusive" finding of "flagrant and patent" preemption required to avoid *Younger* abstention. In fact, it is not even the "determination of facially clear preemption" that Midwestern characterizes it to be. Br. 1. The Seventh Circuit made no finding that the NGA clearly, on its face, answers the question of whether Midwestern's service of delivering gas to end-users is "local distribution."

The briefs opposing the petition quote the Seventh Circuit's use of the terms "activities that clearly are under exclusive federal control" and "defiance of clear federal law"; but they fail to point out that the Seventh Circuit used these terms only in the context of its misguided guess that SIGECO was somehow urging the State of Indiana to interfere with end-users' choice of *gas commodity suppliers*. Pet. App. 6a-8a. As shown in SIGECO's brief in support of the petition for certiorari, the Seventh Circuit's assertion of "clear" preemption is dependent upon sweeping misstatements of the natural gas industry and the mistaken assumption (indisputably refuted by the record) that Midwestern is not connected to SIGECO's distribution system. SIGECO Br. at 6-7; Pet. App. 14a ("Midwestern's pipeline is also connected to the SIGECO distribution system"). The Court's caveat in *NOPSI* that the need for fact-finding *bars* application of any preemption exception, 491 U.S. at 367, rules out application of an exception built on factual *assumptions* that contradict the undisputed record.

II. If The Court Recognizes A Preemption Exception To *Younger*, It Should Follow *NOPSI*'s Requirement Of "Facially Conclusive" "Flagrant And Patent" Preemption.

Even at the most basic level urged by Midwestern and the amici, the exception to *Younger* requires that the preemption issue be clearly determined, beyond dispute, on its face. The district court correctly found that the issue had not been so determined. Pet. App. 59a.

A. Three Inconsistently Reasoned Circuit Court Opinions Do Not Support A Facially Conclusive Finding.

The briefs in opposition incorrectly imply that the preemption issue is clear on its face because three circuit courts of appeals have reached the conclusion that state regulation of bypass transportation is preempted.[3] Under this theory, agreement among about one quarter of the circuits would defeat *Younger*. (Presumably there is no magic in that number, and Midwestern's argument would be the same if only one or two circuits reached "unequivocal holdings." Br. 17.) The Sixth, Tenth and D.C. Circuit holdings are by no means "conclusive"; they did not bind the district court or the Seventh Circuit, they do not bind the IURC or the Indiana appellate courts, and, they certainly do not bind this Court. Moreover, as the district court noted, the three circuits to consider the preemption issue have "acknowledged the difficulty of the question and have recognized that their decisions were necessarily in tension with at least some Supreme Court opinions, just as the opposite result would produce similar tension with other Supreme Court opinions." Pet. App. 59a.

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[3] Perhaps realizing the weakness of reliance on a small number of circuit courts, Midwestern resorts to hyperbole: "*every circuit* has found [the preemption issue] to be clear." Br. 2 (emphasis added).

In the end the circuits agreed *only* in their ultimate holdings and relied upon varying, even conflicting, rationales. For example, the D.C. Circuit, in *Pub. Util. Comm'n of California v. FERC*, 900 F.2d 269, 275 (D.C. Cir. 1990), adopted the rationale of *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 470 (1950), that FERC jurisdiction extends to "high pressure trunk lines to the point where pressure [is] reduced and the gas enter[s] local mains." This "pressure" test was expressly rejected, however, by the Tenth Circuit in *Cascade Natural Gas Corp. v. FERC*, 955 F.2d 1412 (10th Cir. 1992). Instead, the Tenth Circuit pronounced that "local distribution" requires both "the retail sale of natural gas and its local delivery" and occurs at the point where gas is parceled out to purchasing end-use consumers. 955 F.2d at 1420-21. In *Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 887 F.2d 1295 (6th Cir. 1989), the Sixth Circuit dismissed arguments about the state's jurisdiction over "local distribution" using the circular reasoning that delivery of gas to consumers by a pipeline is not "local distribution" because it is "interstate transportation."

Three circuit opinions, unanimous in result but substantially different in reasoning, do not "conclusively" establish "flagrant and patent" preemption.[4] None of these courts even found the definition of "local distribution" to be clear on the face of the statute.

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[4] Like the circuit courts on which they so heavily rely, Midwestern and the amici agree only on their *conclusion* that Indiana Code § 8-1-2-87.5 is invalid. Midwestern defines the term "local distribution" only in the negative with its mantra that "local distribution" is *not* the "'last foot' into an end-user's facility." Br. 21. GPC defines "local distribution" in terms of "low pressure, local delivery systems," a definition rejected by the Tenth Circuit. GPC Br. at 6. Scepter and INDIEC argue that dormant Commerce Clause principles predominate over the statutory interpretation of the NGA that is the focus of the other briefs. Scepter Br. at 4-8 (improperly attempting to raise a constitutional challenge abandoned by Midwestern in the appeal to the Seventh Circuit, which this Court recognized as a jurisdictional bar in *Arkansas Elec. Cooperative Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 382 n.6 (1983)).

B. This Court's Opinions Do Not Support A Facially Conclusive Finding.

The Court has upheld state authority to regulate interstate pipelines' distribution of gas to end-users when the pipeline sells the gas. *Panhandle Eastern Pipe Line Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951); *Panhandle Eastern Pipe Line Co. v. Pub. Serv. Comm'n of Indiana*, 332 U.S. 507 (1947). The Court has *not* considered states' authority to regulate interstate pipelines' distribution of gas to end-users when the sale is made by a third party. In *General Motors Corp. v. Tracy*, 519 U.S. 278, 306 n.14 (1997), the Court, after recognizing changes in the natural gas industry had resulted in the unbundling of gas sales and transportation, stated that "several Courts of Appeals have held that the NGA confers jurisdiction on FERC rather than the States, to regulate such bypass arrangements for supplying gas to large industrial consumers. . . . We express no view on the correctness of these decisions." This express reservation of the issue is the extent of the Court's guidance with respect to Midwestern's claim of preemption.

Respondent and the amici attempt to draw an analogy between the Court's recent decision in *New York v. FERC*, ___ U.S. ___, 122 S.Ct. 1012 (2002), and the jurisdictional dispute that underlies Midwestern's request for injunction and attempt to evade *Younger*. Midwestern goes so far as to claim that the opinion in *New York v. FERC* "*affirmed*" the Sixth, Tenth and D.C. Circuit decisions discussed in Part II(A) above. Of course, *New York v. FERC* did not even mention those circuit court decisions, let alone affirm them. The only similarity between those cases and *New York v. FERC* is that they involve issues concerning the limits of FERC's jurisdictional reach. Aside from illustrating the national importance of such questions, *New York v. FERC* has virtually no bearing on this case.

First, the Court recognized in *New York v. FERC* that it was *not* addressing the validity of a state law alleged to conflict with FERC's assertion of jurisdiction. *Id.* at 1023.[5] When faced with a question of whether "state authority conflicts with, and thus has been displaced by, the existence of Federal Government authority," the Court applies a "presumption *against* preemption." *Id.* (explaining that the Court "starts with the assumption that the historical police powers of the state were not to be superseded . . . unless that was the *clear and manifest purpose* of Congress") (emphasis added). This presumption of validity was not applicable in *New York v. FERC*, but clearly applies here, counseling heavily in favor of abstention and of allowing the state the opportunity to interpret and enforce its laws.

In addition, *New York v. FERC* did not involve the state's exercise of jurisdiction over interstate pipelines (or even interstate electricity providers) engaged in a function traditionally regulated by the state. Instead, the Court addressed FERC's limited exercise of jurisdiction over local electricity utilities (in the absence of state regulation) to require those utilities to transmit competitors' electricity over their portion of the interstate "grid" on the same terms as they applied to their other customers. The federal regulation at issue, and the practices that gave rise

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[5] Midwestern's reliance on *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1 (1961), is misplaced. As the D.C. Circuit recognized in *Pub. Util. Comm'n of Calif. v. FERC*, *Transcontinental* is inapposite because, in that case, no state was seeking to assert jurisdiction over the final delivery to an end-user. *Transcontinental* involved a dispute over FERC's involvement in certification of delivery of gas to an LDC, some of which was to be used by the LDC.

to it,[6] have nothing to do with this case. Certainly, *New York v. FERC* does not resolve, conclusively or otherwise, the issue of whether Midwestern's local delivery service to end use consumers is "local distribution" through "facilities for such distribution" within the meaning of the NGA.

No Supreme Court opinion provides a facially conclusive finding of flagrant and patent preemption, and a few, inconsistently reasoned circuit court opinions do not justify removing the question from Indiana's courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[6] For a detailed comparison of the fundamental differences between the electric and natural gas industries and regulatory concerns in each area, see Peter Fox-Penner, *Electric Utility Restructuring, A Guide To The Competitive Era* (1997). One example is that electricity is not a storable commodity and, thus, the local public utilities are interdependent. All users take from a pool of electricity, "and the system is adjusted so that the total [electricity] flowing into the pool equals the total [electricity] being withdrawn by all users at every moment." *Id* at 26. This interdependence and vulnerability to rapid, large-scale interruption due to local activity is not a factor in the natural gas industry, where gas does not enter an LDC's system from one interstate pipeline and leave through a different pipeline on the other side. LDCs are the endpoint for the local distribution of gas to end-use consumers, not waypoints or interchanges on an interstate "grid."